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No. 01-241

IN THE
Supreme Court of the United States

RICHARD FALLON, M.D.,

Petitioner,

v.

STATE BOARD OF REGISTRATION
FOR THE HEALING ARTS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Missouri

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In a string of unanimous decisions that began with *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), this Court has repeatedly held that ERISA preempts *any* state-based attempt to review or correct purportedly erroneous benefits determinations, because those coverage determinations can be reviewed only in accordance with the exclusive provisions of ERISA § 502, 29 U.S.C. 1132. The federal courts of appeals, unsurprisingly, have followed the exclusivity principle set forth in those decisions of this Court. *See* Pet. 12-19 (collecting cases). The Supreme Court of Missouri, however, squarely held in this case that respondent may investigate and discipline Dr. Fallon for his "denial of surgical insurance coverage" to patient V.G., even though it is undisputed that Dr. Fallon was acting solely in his capacity as a utilization review administrator for an ERISA plan. *See* Pet. App. 23a-24a. That departure from the consistent course of federal court decisions clearly warrants this Court's review.

1. Respondent defends the decision below primarily on the ground "that licensing [of] the health professions" is a field "traditionally" left to state law (Br. in Opp. at 10-11), entitling States "to investigate the use of professional judgment in the course of benefits review" with a view toward "revoking or limiting use of the licenses they grant and supervise." *Id.* at 3, 5. According to respondent, were this Court to consider the purportedly medical character of Dr. Fallon's decision, together with "the presumption in favor of preserving traditional state regulation" over "the licensing of professionals," the "alleged conflict among the courts would evaporate." *Id.* at 10.

Respondent cannot avoid *Pilot Life* and its progeny merely by incanting that States "traditionally" have supervised the exercise of "medical judgments," since States likewise "traditionally" engaged in numerous forms of regulation that now are clearly barred by ERISA, including —before *Pilot Life*—punishing certain coverage decisions

directly through the tort of "bad faith" or through punitive damage awards. ERISA's language, and this Court's decision in *Pilot Life,* make it clear that those state efforts are now preempted. Not surprisingly, this Court and the federal courts of appeals have repeatedly rejected the traditional-state-function argument that respondent now advances, giving the lie to respondent's efforts to defend the decision below and to deny the fact that the lower courts are divided. Indeed, as this Court recently noted, "ERISA certainly contemplated the pre-emption of substantial areas of traditional state regulation." *California Div. of Labor Standards v. Dillingham Constr., N.A.*, 519 U.S. 316, 330 (1997). "[T]he traditional or nontraditional nature of the state law," as the Fifth Circuit also has noted, cannot overcome ERISA's language, especially since this Court's cases demonstrate that "the fact that states traditionally have regulated in a particular area has functioned as no impediment to ERISA pre-emption." *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1334 (5th Cir. 1992) (citing *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990)).

Far from supporting respondent's notion that States may isolate and punish medical judgments allegedly made as part of ERISA coverage decisions, the federal courts have been virtually unanimous in rejecting respondent's attempt to attach talismanic significance to the purported "medical" dimension of coverage decisions. As the First Circuit put it, it does *not* matter under ERISA that decisions made by someone in Dr. Fallon's position "may be characterized as medical in nature * * * What matters * * * is that the conduct was indisputably part of the process used to assess a participant's claim for benefits under the plan. As such, ***any state-law-based attack*** on this conduct would amount to an 'alternative enforcement mechanism'" forbidden by ERISA. *Danca v. Private Health Care System, Inc.*, 185 F.3d 1, 5-6 (1st Cir. 1999) (emphasis added); *accord Jass v. Prudential Health Care Plan, Inc.*, 88 F.3d 1482, 1489-90 (7th Cir.

1996); *Corcoran*, 965 F.2d at 1333 (5th Cir. 1992) ("It may be true * * * that Louisiana tort law places duties on persons who make medical judgments within the state * * * But it is equally true that Congress may pre-empt state-law causes of action * * * when it determines that such actions would interfere with a carefully constructed scheme of federal regulation").

2. Respondent also contends that its attempt to discipline Dr. Fallon is *not* an "alternative enforcement mechanism" forbidden by *Pilot Life* and its progeny, because it does not involve any attempt by a plan participant or beneficiary to recover ERISA plan benefits. Br. in Opp. 6. As respondent sees it, "[l]icensure investigations do not currently nor retroactively affect 'utilization review' or the benefits an ERISA plan provides to any participant or beneficiary." *Id.* at 5. Although a conflict "that merits this Court's review" would exist if a participant or beneficiary *instigated* respondent's investigation as a "back door" to influence benefits determinations by the ERISA plan, respondent contends that "we have not reached that day yet." *Id.* at 11.

Respondent's argument would transform the preemption inquiry under ERISA into a free-wheeling, subjective (and quite possibly indeterminate) investigation of the Board's motivations—of how and why ERISA utilization review agents came to be disciplined by the State—and would permit disciplinary action whenever discipline cannot be shown to be directly designed to secure benefits for an identifiable individual. There is no support for that approach in the text of ERISA or in the decisions of this Court. Section 502(a) does not, as respondent suggests (Br. in Opp. 7), preempt only attempts "by a plan participant to obtain" review of an adverse benefits determination or actual attempts to secure ERISA benefits. Section 502 not only specifies the circumstances in which plan participants may bring suit to ensure that ERISA plans are administered properly, but also identifies when employers, plan

fiduciaries, the Secretary of Labor, *and States* may do so. *See* 29 U.S.C. §§ 1132(a)(1)-(9). Those remedial provisions "represent[] a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans" (*Pilot Life*, 481 U.S. at 54), and were plainly intended by Congress to be exclusive of *any* state remedies. *See Ingersoll-Rand*, 498 U.S. at 144.

The comprehensiveness and exclusivity of the remedies set forth in Section 502 preclude other state avenues of relief even when those avenues provide remedies, such as compensatory or punitive damages, that are not available *at all* to *anyone* under ERISA—as *Pilot Life* held. Similarly, this Court in *Ingersoll-Rand* reaffirmed the exclusivity of ERISA's remedies even when the plaintiff never became eligible for benefits because he was discharged to prevent him from attaining eligibility. Indeed, in a statement that anticipated—and rejected—respondent's arguments that its investigation may proceed because it seeks to secure no benefits for ERISA beneficiaries or participants, this Court in *Ingersoll-Rand* emphasized that "it is no answer to a pre-emption argument that a particular plaintiff is not seeking recovery of * * * benefits." *Ingersoll-Rand*, 498 U.S. at 145. Whether initiated by plan participants or others, therefore, *any* state-law attempt to review or correct errors of plan administration falls squarely within ERISA's preemptive scope.[1]

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[1] Where Congress intended to save state laws from preemption, it made its intention express and unequivocal. *See, e.g.*, 29 U.S.C. § 1144(b)(2)(A) (saving state insurance laws); 29 U.S.C. § 1144(b)(4) (saving from preemption "any generally applicable criminal law of a State"). The Board has not claimed that its proceeding against Dr. Fallon is somehow saved from preemption under any of ERISA's "saving" provisions.

Respondent's argument also ignores the fact that ERISA preemption seeks to ensure that plan sponsors and administrators are subject to uniform regulation of employee benefit plans in each of the fifty States without the administrative and financial burden of a hodgepodge of differing and inconsistent state and local regulations. "'[T]he goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government * * * [and to prevent] the potential for conflict in substantive law * * * requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction.'" *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656-57 (1995) (citation omitted).[2] Because Congress intended ERISA to ensure uniformity in benefits regulation, this Court has "not hesitated to enforce ERISA's pre-emption provision where state law created the prospect that an employer's administrative scheme would be subject to conflicting requirements." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 10 (1987); *see also Boggs v. Boggs*, 520 U.S. 833, 842 (1997) (ERISA was meant to "secur[e] national uniformity in the administration of employee benefit plans").

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[2] This objective is highlighted in the legislative history of ERISA. *See, e.g.*, 120 CONG. REC. 29,197 (1974) (statement of Rep. Dent) (describing ERISA's "crowning achievement" as the "reservation to Federal authority the sole power to regulate the field of employee benefit plans. With the preemption of the field, [ERISA] round[s] out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation"); 120 CONG. REC. 29,933 (1974) (statement of Sen. Williams) ("It should be stressed that with the narrow exceptions specified in [ERISA], the substantive and enforcement provisions * * * are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans").

The decision below creates precisely the type of structure that could subject ERISA plans to conflicting duties in each State of the Union. At the most basic level, and contrary to respondent's assertions, disciplining utilization review agents *for their coverage decisions on behalf of the plan* necessarily pressures those agents (and thus the plan) into making whatever decisions the State disciplinary authorities will find acceptable, irrespective of how the controlling plan documents are interpreted by other utilization review agents in other parts of the country. In this respect, that sort of "discipline" does not differ in essence from punitive damages awards against the plan, which this Court found preempted in *Pilot Life*. Moreover, contrary to respondent's attempt to paint the decision below as narrowly limited to "licensure" requirements, the Supreme Court of Missouri actually concluded that those aspects of plan administration that purportedly embody "medical" judgments are *not* part of plan administration *at all*. *See* Pet. App. at 4a ("the determinations [made by Dr. Fallon] fall outside the scope of plan administration" because "[Dr. Fallon] used medical training and judgment to make a decision about the 'medical necessity' of surgical treatment for a particular patient").[3] Because the decision below is squarely predicated on the notion that Dr. Fallon's conduct is simply not part of "plan administration," the Missouri Supreme Court's ruling necessarily authorizes not only disciplinary actions involving "licensure" laws but also any tort suit that purportedly is predicated on the "medical" component of the utilization review decision.

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[3] *See also* Pet. App. at 6a ("[Although] Prudential made an *administrative* decision when it determined that the plan would not extend to cover [treatment] unless the medical director found it to be 'needed and appropriately provided[,]' * * * Dr. Fallon * * * made a purely *medical* decision when he determined that the procedure was not 'medically necessary'") (emphasis in original).

The rationale employed, and the result reached, by the Supreme Court of Missouri cannot be reconciled with the Eighth Circuit's decision in *Hull v. Fallon*, 188 F.3d 939 (8th Cir. 1999), which affirmed the dismissal of a state-law medical malpractice claim against Dr. Fallon. *Hull* squarely held that Dr. Fallon's coverage determinations were acts of plan administration reviewable only in accordance with Section 502(a). 188 F.3d at 942. As respondent does here, Hull claimed that his state-law suit against Dr. Fallon was *not* predicated on an act of plan administration but on Dr. Fallon's exercise of flawed medical judgment. *See id.* at 942-43 (asserting claim against Dr. Fallon for medical malpractice). The Eighth Circuit summarily rejected that view, emphasizing that "plan administrators necessarily exercise medical judgment in determining benefits due under the plan" and that any claims that "relate to th[ose] [determinations] fall squarely within the scope of section 502(a)." *Id.* at 943; *see also Kuhl v. Lincoln Nat'l Health Plan, Inc.*, 999 F.2d 298, 303 (8th Cir. 1993) (a plan administrator's "decision not to precertify payment relates directly to [the] administration of benefits").[4]

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[4] Although this Court had occasion to consider issues relating to the administration of ERISA-governed health plans in *Pegram v. Herdrich*, 530 U.S. 211 (2000), it did not rule on any preemption issue. *See* 530 U.S. at 229 n.9 (noting that Court "ha[d] no occasion to discuss" the standards governing a § 502(a) claim for benefits nor "the interaction of such a claim with state law causes of action"). For that reason, every court of appeals that has faced the issue has concluded that *Pegram* did not alter ERISA-preemption doctrine, including the analyses reflected in cases like *Hull*, *Corcoran*, *Jass*, and *Danca*. *See, e.g.*, *Corporate Health Ins., Inc. v. Texas Dep't of Ins.*, 215 F.3d 526 (5th Cir. 2000), *on petition for reh'g*, 220 F.3d 641, 643, *petition for cert. filed sub nom.*, *Montemayor v. Corporate Health Ins., Inc.*, No. 00-665 (Oct. 24, 2000); *Pryzbowski v. U.S. Healthcare, Inc.*, 245 F.3d 266, 274-75 (3d Cir. 2001).

Hull and the decision below cannot both be correct. If, as the Supreme Court of Missouri held below, ERISA does *not* preempt a state-law challenge to a medical director's coverage determination, then the Eighth Circuit clearly erred in affirming the dismissal of Hull's medical malpractice claim against Dr. Fallon. Just as he did when reviewing V.G.'s claim for benefits, Dr. Fallon determined whether the treatment Hull's physicians had proposed was "medically necessary." Under the rationale of the decision below, Hull presumably would be entitled to seek redress at state law for any harm caused by Dr. Fallon's purportedly improper coverage determination, because Hull's claim would be predicated—*not* on any act of plan administration—but on Dr. Fallon's "medical judgment." Alternatively, if the Eighth Circuit is correct that coverage determinations by a medical director are acts of "plan administration" reviewable only in accordance with Section 502(a), then the Supreme Court of Missouri erred in failing to deem the Board's proceeding against Dr. Fallon preempted. Thus, apart from the fact that this Court's decisions squarely foreclose respondent's arguments on the *merits*, respondent is simply wrong to deny that the decision below squarely conflicts with *Hull* and its progeny—*and* with the decisions of the First, Fifth, and Seventh Circuits in *Danca*, *Corcoran*, and *Jass*. *See* Pet. 16-18. That conflict warrants this Court's immediate attention.

3. Respondent also vastly understates the importance of the question presented. Respondent breezily asserts that allowing state medical boards to investigate and discipline medical directors for making purportedly erroneous coverage determinations will "not pose a real threat to ERISA's goal of providing employees like V.G. with healthcare benefits." Br. in Opp. 13. Quite to the contrary, the decision below could have a devastating effect on the efficient functioning and long-term survival of employer-sponsored health benefit plans. Left unreviewed, the decision below will erect a proverbial sword of Damocles over every medical director, in every managed care organization, who bears responsibility

for making *coverage* determinations under ERISA-governed health plans. Those medical directors inevitably will be pressured to authorize coverage *solely* to avoid professional discipline, even in circumstances in which such a determination would otherwise be inconsistent with their best judgment as to the coverage that plan documents actually authorize.

Moreover, the decision below will subject ERISA plans to a host of conflicting state regulatory directives that make the uniform administration of nationwide employee health plans impossible. Twenty-six States now purport to require medical directors of managed care companies to be licensed physicians in the State in which plan members or the plan reside. *See* Pet. 21-22 & n.7. Left unreviewed, the decision below will invite the medical boards in each of those States to investigate and discipline medical directors and their staffs for making adverse coverage determinations, even where, as in this case, it is undisputed that the medical director did not treat or otherwise recommend care to the plan subscriber. *See* Pet. App. 10a-11a. The burden those disciplinary proceedings would place on plan sponsors and administrators, to say nothing of the medical directors themselves, can hardly be overstated. Indeed, those increased and unpredictable burdens may well cause "employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them." *Fort Halifax Packing Co.*, 482 U.S. at 11. Immediate review by this Court is necessary to restore the uniformity and predictability in plan administration that ERISA was enacted to ensure.

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For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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